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Contracts--Third Party Beneficiary Contract-- When a Right Vests in a Donee Beneficiary

Leslie W. Morris II
University of Kentucky

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aquae at the middle of the stream.¹⁶ Either view on this point would work substantial justice if strictly adhered to, but the decision reached is the better one since a boundary marked by the center of a stream is morelikely to be a stable line than one dependent on location of the center of the main channel.

As to the procedure for locating the center of the stream, the instant decision places Kentucky in the minority.¹⁷ The *filum aquae* is located by measuring from *low* water mark to *low* water mark rather than by the majority rule of measuring from the water mark at the *ordinary stage*. It is submitted that the minority view is the sounder view. Since one of the reasons for giving riparian owners rights in stream beds is to establish their unquestioned right and access to the water, it is better that the *filum aquae* be reckoned from low rather than normal stage because if measured at normal stage, it is quite possible that at low water an owner on one side could be entirely cut off from the actual stream.

The sound decision reached in this case will be of future importance where the ownership of minerals lying under stream beds is involved, where accretion problems arise, where there is a question of the location of property for tax purposes, where a dispute arises as to the amount of land in a described boundary, and also where the riparian owner is required to predict how far into the stream he may take the water for his own use, such as irrigation.

JAMES FRANCIS MILLER

CONTRACTS—THIRD PARTY BENEFICIARY CONTRACT—WHEN A RIGHT VESTS IN A DONEE BENEFICIARY—In 1947, the defendant's fifty year old father, John Rhodes, entered into a five year employment pact with American Association. This arrangement provided for certain annuity payments to the defendant, a minor, in the event Rhodes died before the age of sixty-five while in the employ of the Association. The contract was to be mutually renewable and contained a clause which pro-

¹⁶ The center or thread of the stream for navigational purposes is called the thalweg. For the definition, see 3 AMERICAN LAW OF PROPERTY 247 (1952) note, Thalweg: "The thalweg is a navigational term. It is the thread or center of the main channel, the middle of the navigable channel, the deepest part of the most navigable channel, or the track taken by boats in their course downstream. It is often the boundary between states but is only occasionally a private boundary."

¹⁷ 3 AMERICAN LAW OF PROPERTY 247 (1952) *filum aquae* said to be, "... the geographical center line of the stream ... [measured] at the ordinary stage of water. . . ."; 11 C.J.S. 578 (1938); "Although there is authority that under certain circumstances the thread of the stream is midway between the shore lines when the water is at its low stage, it is generally held that the line will be so drawn when the water is at its natural stage at medium height". See cases cited.

vided that "in view of the possibility of fluctuations in the value of Pounds Sterling or Dollars, either party hereto may request a renegotiation of this contract at any time during the term thereof." In 1950, Rhodes entered into a new agreement whereby, among other things, the plaintiff, his second wife, was named as the beneficiary in the place of the defendant. Rhodes died in 1951 and the plaintiff brought suit on the 1950 contract. The lower court held that the first contract had been effectively rescinded "in the manner therein provided" and that the plaintiff was entitled to recover under the 1950 agreement. *Held*: Reversed. Parties to a contract for the benefit of a third person cannot rescind the contract without the latter's consent, and thereby deprive him of its benefits, after he has accepted, adopted, or acted upon the contract, unless the right to rescind is reserved in the contract. Since the defendant is an infant, his acceptance of a contract for his benefit is presumed. The provision pertaining to "renegotiation" did not amount to a reservation of power to rescind the contract without the consent of the third party beneficiary. *Rhodes v. Rhodes*, 266 S.W. 2d 790 (Ky. 1953).

Despite some unfortunate language which tends to confuse the holding,¹ this case emerges as a statement of Kentucky's view as to when a donee beneficiary's right vests, thereby preventing a rescission of the contract without his consent. Though the court's cursory rejection of the "renegotiation clause" as inclusive of the right of rescission may well be questioned,² it is of even more importance to consider the court's attitude toward the legal position of the donee beneficiary in the absence of such a reservation.

¹ In the latter stages of the court's holding, it is asserted that the parties "did not in reality rescind" the contract, and that references made by them in regard to cancellation of the contract referred to the paper document rather than to the contractual agreement. It is extremely difficult to interpret these comments in light of the court's apparent view that the parties intended to replace the original contract with the 1950 contract, and that, therefore, although they might have thought they were merely amending, the legal effect of their action was to cancel the agreement.

² It was held that the "renegotiation clause" contemplated a renegotiation only with respect to the amount of compensation or benefits to be paid to Rhodes. However, as the appellant's petition for a rehearing pointed out, the court apparently broadened this narrow interpretation itself, by giving silent approval to Rhodes' change in position, i.e., his promotion from vice-president to president of the Association. Since this had nothing directly to do with the amount of compensation, it would seem to lend strength to the contention that *all* of the terms changed by the mutual agreement were within the scope of the "renegotiation clause." The contract of 1947 also expressly authorized the execution of a new and different contract in 1952, which may imply that the parties intended to reserve the right to renegotiate and renew the contract before its expiration. *But see* RESTATEMENT, CONTRACTS sec. 142, comment (a) (1933): "The reservation of power on the part of the promisee to change the beneficiary or otherwise to vary the terms of a gift promise must ordinarily be expressed in specific terms. . . ."

It is so well established today that a third party may sue to protect his vested interests under a contract for his benefit, that citations to that effect would appear unnecessary. Kentucky avowedly adopts the majority rule that a donee beneficiary's right vests when he acquires knowledge of the contract and assents thereto.³ Therefore, assuming the defendant's assent, the subsequent renegotiation of the contract which substituted the wife as the beneficiary of the annuity was ineffective to destroy his right.

What is necessary to constitute knowledge and acceptance of such a contract? Of course, formal and express assent is sufficient. But, by the very nature of a third party beneficiary contract, it is evident that a formal manifestation of assent is not always possible or expected.⁴ In many cases what is required in the way of assent is not defined. However, it is consistently recognized that a third party beneficiary's assent can be implied by some overt act on his part, such as a suit on the contract.⁵ It is apparently enough, therefore, that the beneficiary knows of the contract when he initiates his action.⁶ In addition, a broader view has gained favor which indicates that a beneficiary's assent to a contract which confers a "benefit without burden" will be presumed when the contract is made,⁷ and many courts have added that this presumption cannot be rebutted unless the beneficiary's dissent is shown.⁸

There was no evidence in the principal case that the infant had any knowledge of the contract for his benefit or that he expressly agreed to or accepted its provisions. But the court presumed his acceptance of the contract, following cases which have presumed acceptance by an infant of deeds made to him, whether or not he

³ 12 AM. JUR. 843 (1938). Kentucky has consistently followed the majority rule. See *Dodge's Adm'r v. Moss*, 82 Ky. 441 (1884); *Jones v. Higgins*, 80 Ky. 409 (1882); *Spalding v. Henshaw*, 80 Ky. 55 (1882). The *Rhodes* case has been cited in *American Trust Co. v. Catawba Sales and Processing Co.*, 242 N.C. 370, 88 S.E. 2d 233 (1955), as standing for the rule that a contract made for the direct benefit of a third person cannot be materially changed where the contract has been accepted or acted upon. See also 4 CORBIN, CONTRACTS sec. 814 (Supp. 1954), which cites the principal case.

⁴ 78 AM. JUR. 841 (1938).

⁵ *Wolters Village Management Co. v. The Merchants & Planters Nat'l Bank of Sherman*, 223 F. 2d 793 (5th cir. 1955); *Jackman Cigar Mfg. Co. v. John Berger & Son*, 114 Ind. App. 437, 52 N.E. 2d 363 (1944); *Johnson v. Central Trust Co.*, 159 Ind. 605, 65 N.E. 1028 (1903). See *Williston, Contracts for the Benefit of a Third Person*, 15 HARV. L. REV. 767, 799 (1902).

⁶ 12 AM. JUR. 841 (1938) states: "... [C]ommencement of an action [on the contract] is both [notice of] acceptance and demand. ..."

⁷ *Waterman v. Morgan*, 114 Ind. 237, 16 N.E. 590 (1888); *Rogers v. Gosnell*, 58 Mo. 589 (1875); *Lawrence v. Fox*, 20 N.Y. 268 (1859) (a landmark case); *Baker v. Eglin*, 11 Ore. 333, 8 P. 280 (1884); 12 AM. JUR. 841 (1938).

⁸ *Rogers v. Gosnell*, *supra* note 7; 12 AM. JUR. 841 (1938).

actually knew of the gift.⁹ It has been generally held that the law accepts a benefit for an infant,¹⁰ and that his acceptance will be presumed as contemporaneous with the promise.¹¹ The court did not avail itself of the opportunity to draw an analogy here to the insurance cases. It is an almost universal doctrine that as soon as a contract of insurance takes effect, the right of the beneficiary vests and is not subject to abrogation.¹² Under this analogy it would have been unnecessary to presume the third party's acceptance.

Of course, a contract for the benefit of a third person is binding upon the contracting parties irrespective of the beneficiary's expression of assent, unless his assent is made a condition upon which the contract depends.¹³ The question is whether the beneficiary must express his assent thereto in order to take advantage of the contract's provisions or to prevent the parties from rescinding.¹⁴ Kentucky, following the majority rule, answers this query in the affirmative. The parties may rescind, vary, or abrogate the contract before it is accepted, adopted, or acted upon.¹⁵ A possible explanation for knowledge and assent as a necessary element is the historical notion that the beneficiary must in some way be brought into privity with the promisor.¹⁶

A strong minority view is that the donee beneficiary's right vests as soon as the contract is consummated.¹⁷ That is to say, the agreement cannot be rescinded without the consent of the beneficiary, even before the latter becomes aware of the contract or accepts it.¹⁸ This is

⁹ *Cassady v. Cain*, 311 Ky. 179, 223 S.W. 2d 744 (1949); *Mullins v. Mullins*, 120 Ky. 643, 87 S.W. 764 (1905). See also *Pruitt v. Pruitt*, 91 Ind. 595 (1883); *Henderson v. McDonald*, 84 Ind. 149 (1882).

¹⁰ 27 AM. JUR. 751 (1940).

¹¹ *Waterman v. Morgan*, supra note 7 at 592. Cf. *Phillips v. Plastringe*, 107 Vt. 267, 179 A. 157 (1935) (Acceptance of a gift by a donee will be presumed, especially where the gift is from parent to child). But see *People's Bank & Trust Co. v. Weidinger*, 73 N.J. 433, 64 A. 179 (1906).

¹² *Townsend v. Townsend*, 127 Ky. 230, 105 S.W. 937 (1907). See also 2 WILLISTON, CONTRACTS 1140, 1079-1082 (1936); Page, *The Power of the Contracting Parties to Alter a Contract for Rendering Performance to a Third Person*, 12 WIS. L. R. 141 at 180 (1937).

¹³ 12 AM. JUR. 514 (1938).

¹⁴ *Id.*, at 514-515. In discussing the power of parties to rescind a third party beneficiary contract, authorities appear to make no clear distinction between the creditor and the gift beneficiary. See 12 AM. JUR. 844 (1938); GRISMORE, CONTRACTS 406 (1947); Page, supra note 12 at 183. But see *infra* note 19. For a good modern discussion of third party beneficiary contracts, see *The No. Nat'l Bank of Bemidji v. Northern Minn. Nat'l Bank of Duluth*, 70 N.W. 2d 118 (Minn. 1955).

¹⁵ *Supra* note 3. See also 17 C.J.S. 883 (1939).

¹⁶ GRISMORE, supra note 14 at 406.

¹⁷ *Tweeddale v. Tweeddale*, 116 Wis. 517, 93 N.W. 440 (1903) (the leading case); WILLISTON supra note 12 at 1139-1140; 12 AM. JUR. 843 (1938). For citation of cases see 81 A.L.R. 1271 at 1293 (1932).

¹⁸ *Supra* note 17.

the "insurance rule" and it has been urged that it be generally applied.¹⁹ The contention is that the beneficiary's right is analogous to those arising upon a gift of property or the creation of a trust, where the donee's right vests immediately.²⁰

A few cases suggest that the right vests in the third party when he merely learns of the contract for his benefit.²¹ Other jurisdictions have declared that the parties can modify the contract until the beneficiary changes his position in reliance upon the promised gift.²² It is admitted that acting upon the faith of, or in reliance upon, the contract will defeat its rescission, but the weight of authority supports the doctrine that something less will suffice.²³

Assent, then, is the vital thing in the majority of decisions. But this requirement seems to disintegrate when it is considered what has been held to constitute assent or acceptance. Many courts, as noted, presume assent to a purely beneficial contract as soon as the contract is effected. In some instances notice of assent is in some way required and in others it is not. Where notice is not required, according to Professor Corbin, assent is not actually required, and the donative-right vests in the beneficiary even before he has knowledge of the gift.²⁴ Therefore, there is a shading of the majority rule into the minority argument as the required assent breaks down. In fact, one cannot escape the impression that some writers and judicial decisions seem to confound this watered-down assent with the rule that

¹⁹ It is interesting to note the position taken by the RESTATEMENT, CONTRACTS sec. 142: "Unless the power to do so is reserved, the duty of the promisor to the donee beneficiary cannot be released by the promisee or affected by any agreement between the promisee and the promisor. . . ." Sec. 143 states: "A discharge of the promisor by the promisee in a contract or a variation thereof by them is effective against a creditor beneficiary if, (a) the creditor beneficiary does not bring suit upon the promise or otherwise materially change his position in reliance thereon before he knows of the discharge or variation. . . ." In other words, the RESTATEMENT applies to donee beneficiary contracts the rule that the beneficiary's right vests immediately, and applies to creditor beneficiary contracts the rule that the promisee continues in control of his obligation so long as the beneficiary does not change his position in reliance thereon. Williston, *supra* note 12, at 1060, 1061, 1144-1147, explains the RESTATEMENT attitude on the nature of the creditor beneficiary's rights. These RESTATEMENT sections are, of course, opposed to the general rule. Page, *supra* note 12, at 183, 184, submits that the RESTATEMENT runs exactly contra to the "general feeling," and that there is less reason to give the donee beneficiary an indefeasible right than to give one to the creditor.

²⁰ WILLISTON, *supra* note 12 at 1139; GRISMORE, *supra* note 12 at 406-407.

²¹ Page, *supra* note 12 at 155. Cf. *Gilbert v. Sanderson*, 56 Iowa 349, 9 N.W. 293 (1881); *Hill v. Hoeldtke*, 104 Tex. 594, 142 S.W. 871 (1912).

²² *John F. Clark & Co. v. Nelson*, 216 Ala. 199, 112 So. 819 (1927). See also Page, *supra* note 12 at 160, 161.

²³ 12 AM. JUR. 841 (1938).

²⁴ CORBIN, *supra* note 3 at 134-135 (1951).

the donee beneficiary's right vests immediately.²⁵ Certainly from the standpoint of the beneficiary there is little, if any, practical difference whether his right vests immediately upon the making of the contract or "immediately" as the by-product of the doctrine of presumed acceptance. Professor Page illustrates this blending by suggesting that in some cases, particularly where there is a family settlement or an infant's interests in jeopardy, the rule that the beneficiary's right attaches when the contract is made "combines" with the contra requisite of knowledge and acceptance.²⁶ In other words, while assent is necessary to vest a beneficiary's right, it will be presumed if the contract is advantageous, and the presumption arises when the contract is made.²⁷

Unless a right has vested before rescission of the contract, then, the beneficiary cannot object. In summary, it is seen that there are actually four views as to the point of time when the right of the beneficiary vests and is no longer subject to abrogation by the contracting parties: (1) when the contract is entered into; (2) when the beneficiary acts to his detriment in reliance upon the contract; (3) when the beneficiary learns of the contract; (4) when the beneficiary learns of the contract and assents thereto. The latter rule, adopted in a majority of jurisdictions, can be arbitrarily categorized as follows in regard to the required assent: (a) express assent; (b) assent implied from some overt manifestation; (c) assent presumed from the beneficial nature of the contract.

The general rule which the Kentucky Court of Appeals will follow in a case involving a donee beneficiary is decided by the principal case. Kentucky will undoubtedly continue to follow the majority rule that a donee beneficiary's right vests after he has accepted, adopted, or acted upon the contract. The decision, however, might be interpreted on its face as meaning that only an *infant's* assent will

²⁵ WILLISTON, *supra* note 12 at 1139, in discussing the minority rule that a donee beneficiary's right vests immediately upon the making of the contract, states that since a gift is a pure benefit, there is no reason why the donee's assent should not be presumed, unless and until he expresses dissent. The confusion which exists among authorities as to how to categorize the doctrine of "presumed acceptance" is illustrated by the various interpretations of *Waterman v. Morgan*, *supra* note 7. This case seems to hold that where the beneficiary is an infant, no formal or express acceptance of the contract is necessary, but that since the contract is beneficial, his acceptance will be presumed when the transaction is closed. Williston cites this case as supporting his contention (above) for the minority rule. Other authorities apparently consider the case as representative of a form of the majority rule. See 12 AM. JUR. 841 (1938); Page, *supra* note 12 at 155. In addition, the *Waterman* case has been cited as illustrative of the rule that the third party beneficiary's right vests when he *learns* of it. See SIMPSON, CONTRACTS 322 (1954).

²⁶ Page, *supra* note 12 at 155.

²⁷ *Ibid.*

be presumed. It remains to be seen whether the "presumed acceptance" in this case will be reaffirmed and applied to *any* donee beneficiary.

LESLIE W. MORRIS II

CRIMINAL PROCEDURE—RIGHT TO COUNSEL—NECESSITY THAT DEFENDANT HAVE AID OF AN ACCOUNTANT IN A COMPLEX TAX PROSECUTION—Defendant, a notorious gambler, was indicted for filing false and fraudulent income tax returns. Defendant had no assets at the time of indictment or at the time of trial, since all his property was subject to jeopardy assessments and tax liens in favor of the Treasury Department.¹ It was undisputed that the services of a skilled accountant were necessary in order to prepare an effective defense. The trial court, therefore, ordered the government to release some of defendant's funds to enable him to hire an accountant. The government having refused to do so, the trial court dismissed the indictment. *United States v. Brodson*, 136 F. Supp. 158 (E.D. Wisc. 1955).

The trial court's opinion contains an excellent summary of the law which has been developed on the Constitutional right of a defendant to have counsel for his defense.² Viewing the instant case in the light of the recent enlargements of the constitutional right to counsel,³ the Court felt justified in extending protection to the defendant. In reaching this result, the Court was forced to distinguish the case of *O'Connor v. United States*,⁴ a case reaching a contrary result. The Court did this on the grounds that in the *O'Connor* case the defendant's funds, though attached at the time of the trial, has been unencumbered for some twenty-two months *after the indictment*, and that the defendant had therefore had adequate time to hire accounting help before his funds were, in effect, attached.

The Court's primary reason for its position was the apparent un-

¹ INT. REV. CODE of 1939, sec. 3670-3672. (Now INT. REV. CODE of 1954, sec. 6321-6326, 6331.)

² Most of the Court's discussion, however, centered around the "lack of due process" inherent in the government's action here. In other words the Court views the case primarily as a *Fifth* Amendment case, rather than as a *Sixth* Amendment case, although the Constitutional right to counsel, in the Federal courts, is granted by the latter Amendment. It is believed this was caused by the fact that most of the cases discussed were *state* cases, brought under the Fourteenth Amendment, which like the Fifth, contains a "due process" clause.

³ In the opinion of the writer, it is of considerable significance that the trend in the law has been to *broaden* the scope of this particular constitutional right. In conjunction with both this footnote and footnote 2, see Note, 44 Ky. L.J. 103 (1955) and note, 38 Ky. L.J. 317 (1950).

⁴ 203 F. 2d 301 (4th Cir. 1953).